# UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA

IN RE: ZURN PEX PLUMBING PRODUCTS ) MDL NO. 08-1958
LIABILITY LITIGATION ) (ADM/RLE)
)
Courtroom 13 West
) Fri., September 19, 2008
) Minneapolis, Minnesota

#### PRETRIAL CONFERENCE

BEFORE THE HONORABLE ANN D. MONTGOMERY UNITED STATES DISTRICT JUDGE

### TIMOTHY J. WILLETTE, RDR, CRR

Official Court Reporter - United States District Court
1005 United States Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415
612.664.5108

#### APPEARANCES:

For the Plaintiffs:

#### LARSON KING, LLP

By: SHAWN M. RAITER, ESQUIRE 2800 Wells Fargo Place 30 East Seventh Street Saint Paul, Minnesota 55101

#### ZIMMERMAN REED, PLLP

By: J. GORDON RUDD, JR., ESQUIRE
DAVID M. CIALKOWSKI, ESQUIRE
651 Nicollet Mall - Suite 501
Minneapolis, Minnesota 55402

#### LOCKRIDGE GRINDAL NAUEN, PLLP

By: ROBERT K. SHELQUIST, ESQUIRE 100 Washington Avenue South Suite 2200 Minneapolis, Minnesota 55401-2179

## LEA, RHINE, ROSBRUGH & CHLEBOROWICZ, PLLC

By: JOEL R. RHINE, ESQUIRE 314 Walnut Street Wilmington, North Carolina 28401

#### LEWIS & ROBERTS, PLLC

By: JOHN S. AUSTIN, ESQUIRE 3700 Glenwood Avenue - Suite 410 Raleigh, North Carolina 27614

#### HOLLAND & HART, LLP

By: DAVID L. BLACK, ESQUIRE 555 Seventeenth Street - Suite 3200 Denver, Colorado 80201-8749

#### STRAUS & BOIES, LLP

By: TIMOTHY D. BATTIN, ESQUIRE 4041 University Drive - Fifth Floor Fairfax, Virginia 22030

For the Defendants:

#### FAEGRE & BENSON, LLP

By: JAMES A. O'NEAL, ESQUIRE
DANIEL J. CONNOLLY, ESQUIRE
AMY R. FREESTONE, ESQUIRE
DAVID SNIEG, ESQUIRE
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-3901

1	(10:00 a.m.)
2	PROCEEDINGS
3	IN OPEN COURT
4	THE COURT: Good morning. Please be seated.
5	THE CLERK: The Court calls the case of In Re:
6	Zurn PEX Plumbing Products Liability Litigation, MDL 08-1958.
7	Would counsel note their appearances for the
8	record, please.
9	THE COURT: Okay. A cast of thousands here.
10	All right. Mr. Raiter, we'll start with you.
11	MR. RAITER: Good morning, your Honor. Shawn
12	Raiter on behalf of the plaintiffs.
13	MR. RUDD: Good morning, your Honor. Gordon Rudd
14	from Zimmerman Reed on behalf of the plaintiffs.
15	MR. SHELQUIST: Good morning. Bob Shelquist from
16	Lockridge Grindal Nauen on behalf of the plaintiffs.
17	THE COURT: Good morning. Table two.
18	MR. CIALKOWSKI: Good morning, your Honor. David
19	Cialkowski for the plaintiffs from Zimmerman Reed.
20	THE COURT: All right.
21	MR. RHINE: I'm Joel Rhine from Wilmington, North
22	Carolina, for the plaintiffs.
23	THE COURT: Welcome.
24	MR. AUSTIN: Yes, your Honor. John Austin with
25	Lewis & Roberts for the plaintiffs as well.

1	THE COURT: Two North Carolinians.
2	MR. BLACK: David Black, Holland & Hart, from
3	Denver.
4	THE COURT: All right.
5	MR. BATTIN: Good morning, your Honor.
6	Tim Battin, Straus & Boies, from Virginia.
7	THE COURT: All right. Welcome to the
8	out-of-towners, and you've got a better than usual Minnesota
9	day, kind of an atypical day.
10	Mr. O'Neal
11	MR. O'NEAL: Yes, ma'am.
12	THE COURT: let's proceed with the defense side
13	of things here.
14	MR. O'NEAL: Jim O'Neal for the defendants, and
15	with me are my colleagues from Faegre & Benson, Dan Connolly,
16	Amy Freestone, and David Snieg.
17	THE COURT: Good morning. You need a few more
18	members to tip the weight of the courtroom the other
19	direction, I think.
20	MR. O'NEAL: I could bring 50 or 60 if you want,
21	your Honor.
22	THE COURT: You have enough reinforcements, I
23	know, over there to fill up the room.
24	Well, before the Court today at the request of
25	counsel is a pretrial excuse me. We're going to have a

pretrial conference. I have been suffering from a viral bronchitis, so I'm having some voice issues from time to time, so I'm going to struggle through that. You're not making me cry if it sounds like it at some point if I lose my voice as we proceed.

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I did ask and Mr. Raiter was nice enough to provide me a proposed agenda of some of the agreed upon points, but I think what I'd like to do is follow that agenda and first hear from the plaintiffs.

And I take it, Mr. Raiter, you would be the spokesperson for that today, the background of the litigation and a summary of where we have been up to this point.

I do understand that some of these cases have been filed about a year or so.

MR. RAITER: Yes, your Honor. And I will, if I may, pass up to your clerk just a PowerPoint that I'm not going to put on an actual computer but I may put on the ELMO, if you wish to follow along, to give you a bit of a background about how we get here, the nature of the product at issue, the status of the cases that either have been transferred to this district or are expected to be transferred to this district.

And I'm not certain how much your Honor has read from the court file in the Cox matter or the Minnerath matter in terms of the background of the product, so what I plan to

do is at least start with a general description. And I can see from Mr. O'Neal's desk over here that he too has some of the actual product and I think is probably going to cover some of this as well, so I'll be a little bit brief.

THE COURT: All right.

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MR. RAITER: What we have, your Honor, is a flexible plastic pipe plumbing system that is generically referred to as a PEX plumbing system. It is cross-linked polyethylene. Polyethylene and cross-linked gives you the "X", generically known as PEX.

The issue in this particular case are the brass insert fittings that Zurn uses for this system, and both Mr. O'Neal and I have some of these fittings here and I'll pass them up to your Honor's clerk. You can hold them in your hand and take a look at them as we talk.

(Fittings handed to the Court)

MR. RAITER: Generally speaking, this is a system that is used for potable water, for drinking water in homes and in businesses, and the system is the successor to a number of other plastic piping systems, including the polybutylene pipe system, which one of Zurn's predecessors was involved in the manufacture of polybutylene, and the PEX systems and the notion of PEX in general really follows the polybutylene problem in the United States, which was a significant problem as I'm sure your Honor is aware of.

The PEX system itself is in part dependent on, of course, the fittings, because the piping is supposed to be highly corrosion resistant, it is supposed to be flexible, it is supposed to be better than copper, but they've used these brass insert fittings and therein lies the problem in this case, and what Zurn decided to do was use a high zinc-content brass.

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Brass is an alloy and it is primarily made up of copper, and the other primary component or element of brass is zinc, and the amount of zinc in brass then tells you what type of brass it is. If you have a low amount of zinc, you have a red brass, because it's red in color and looks more like copper. Zurn uses a yellow brass, which is high in zinc content, and in the course of this case we expect to prove that the choice of this alloy, the high zinc-content brass, has led to the problems that Zurn is admittedly facing and has admittedly had across the country.

The nature of the problem, your Honor, is really that this particular type of brass is highly susceptible to cracking and a process called dezincification when the brass is placed under stress and then exposed to water. You have these two things going on.

These fittings are under stress, as you'll see in some of the photos, because of the way they are sealed with a copper crimp ring and a tool that actually seals the system

up. So the fittings are under stress. They're then exposed to water. In the metallurgy world, it is well known that this type of brass will be susceptible to cracking and premature failure when exposed to water. The literature will support that.

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In this particular case, some of these fittings have failed literally within months of being installed in someone's home. In some cases that we're aware of it failed within five or six weeks. The failures usually occur behind drywall or in ceilings, or sometimes they're in areas that are unfinished and you don't have as big a problem with damage, but when they're behind drywall and ceilings, you're going to get property damage that arises.

The nature of this problem has progressed over time. Zurn started selling these fittings really in the late 1990s, mid- to late 1990s, and it took some time for them to get code approval. So that by the late 1990s and into the 2000 time frame, 2006, 2007, they had these fittings in literally millions of homes across the country. Not only homes, but also businesses. And starting as early as 1999, from the discovery that we're aware of at this point, as early as 1999, Zurn started to see some of these fittings crack and fail in the field.

And this is a photo of a cracked fitting and those black rings on either side of the brass fitting are the crimp

rings that seal the tube to the fitting. The tube that Zurn manufactures is red, white and blue, so you'll see different-colored PEX tubing. Most of the time it is Zurn tubing. Once in a while you will see a plumber intersperse Zurn fittings with some other PEX manufacturer's tubing and vice versa. So typically speaking, we are dealing with full Zurn systems, but that's not always the case.

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Both the parties have sent failed fittings to an independent lab for inspection and photographing and that's where these photographs come from.

They've got this blocky design. Some of them also have a different exterior feature, this rounded area, but they're all Zurn fittings. They're stamped on the side with a "Q PEX," which stands for "Quest PEX" — that's how we know they're Zurn fittings — and they're supplied by a number of different suppliers that Zurn has used to produce these fittings, most of which are overseas suppliers: Korea, China, India and Italy primarily. In past history Zurn did produce some of those here in the U.S., but most of these are now imported.

And what is important about this -- here's another look at a different-looking fitting, again it's a Zurn PEX fitting -- is that these fittings all comply with the same

ASTM standards. So that the important parts of the fittings are really the barbs. They're the areas that are the end of the fittings that the tube goes over. Those have to be within certain specifications. They're uniform specifications. So despite the fact that they look a little different, really the operative part of the fittings are the same. The materials that a manufacturer like Zurn may use for these types of fittings are also subject to ASTM standards and these are standards that you can pick from any number of materials to use for your fittings.

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This is a photo of a fitting that has been sectioned in the lab and you'll see one of these fine cracks through the middle of it and that is the beginning of a failure, the product failure.

Same fitting, different picture.

The evidence that we have developed thus far, primarily in the Cox case, indicates that Zurn in its development of this product did not test or consider whether these fittings may fail when placed under stress and whether they may see problems with cracking or dezincification.

They as part of their sales process also offered a 25-year warranty with these fittings. The warranty provides for a 25-year warranty that assumes damages for consequential damage caused by failures of the fittings. It is admitted in the case that the same warranty applies to all of the

fittings at issue here. There are some issues about exclusions within that warranty and we I believe agree that the same exclusions apply to all the fittings at issue here. So what we have is a standardized product being sold subject to the same warranty, both the grant of the warranty and the same warranty limitations, and the product starts to fail in the field. There's no dispute about that. We see these fittings. They've known they've had something going on that is causing the failures.

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They send them out in 1999 to a third party for some testing to try to figure out why they're failing and they learn that the cause of the problem or the mechanism of the failure is as indicated before. Stress corrosion cracking is the technical name of it, SCC, and there is some element of dezincification under way as well.

Dezincification essentially, your Honor, is the zinc ions or the zinc portions of this brass getting stripped out of the brass, leaving behind a porous copper material. It almost ends up looking like a sponge on a microscope. Where there should have been zinc, you're left with brass and it then becomes brittle or it becomes weakened and it starts to crack when it's under stress like these fittings absolutely are because of the way that they are designed to be crimped and actually put together.

The warranty claims begin to come in to Zurn in

2000, 2001. They're starting to hear from the field that:

"Hey, we've had a product failure and this is something that
should be covered by your warranty."

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Despite knowing as early as 1999 that these failures were caused by stress corrosion cracking and by dezincification, they have paid warranty claims literally by the hundreds. They have also allowed people to replumb their entire homes after they have had failures, because Zurn has admitted in the course of the case that if you had a failure at a property, you very well may have others.

And as a background here, your Honor, these fittings in a two-and-a-half bath house, let's say, you can expect to see 30, 40, 50 fittings per home. In the same home there are also other types of materials in contact with the same water. There are other brasses. In your shower valves, in your fixtures, in your sinks, your drains, your washer and dryer hookups have different metals in them. Coming off of your water heater you may have copper initially and then it may connect to PEX from there on out. PEX is cheaper than copper. It's cheaper both in terms of the cost of the material and it's also cheaper to install because it's easier to install. They use a crimp system here that I think Mr. O'Neal will show you. They don't need to sweat the joints like you do with copper.

So, as the warranty claims increase, Zurn is trying to investigate why these things are failing, because quite often these brass fittings fail in a home where none of the other fixtures have a problem. The brass from other fixtures doesn't have a problem, the copper in the system has no problem whatsoever, but these fittings literally crack right off in some circumstances. In other circumstances they just drip and they weep until someone notices a water spot on their ceiling or behind their wall. As I said, in some circumstances they shear and you have hundreds if not thousands of gallons of water going into people's homes because of the catastrophic failure.

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You'll hear in this case that water chemistry is central to Zurn's defense. Their main defense is this is aggressive water. That's what is causing these fittings to fail. We believe both their internal documents, their testimony and the other evidence already developed shows otherwise. Our experts believe otherwise as you'll see throughout the course of the case.

But what you'll learn is that these fittings have failed on city water systems in cities like Woodbury,

Lakeville, Elk River, right here in Minnesota. You'll hear that they failed on well water systems. You'll hear that they failed on systems that were softened, that were unsoftened. They failed in a wide variety of water

conditions and the one constant is the Zurn fittings.

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Zurn as of fairly recently in depositions still indicated that it really doesn't know why these fittings are failing. It can't point to anything in the water in particular that says: "Ah ha. At Judge Montgomery's home you had this in the water and that's why those fittings failed." They cannot do that, they have not done it, nor have they warned about any of those things, and that's another part of our course, that if there was something that they knew about or should have known about, they've not warned and people were very well able to rely on the lack of warranties or warnings and therefore installed the product.

The failure problem grows in the early 2000, 2001, 2003 time frame, 2004. This is an e-mail that on the ELMO you can't see much of, but the next slide is a pull-out from that same e-mail. But this comes from one of Zurn's local independent sales reps based right here in Minnesota. This is in 2004. Mr. Sackrison is the guy who sells -- or his company is the company that sells Zurn PEX product in the state of Minnesota. He's the independent rep, he's the manufacturer's rep, however you like to call it. He's the person. Because Zurn doesn't have its own sales force, so they use these independent reps.

As you can see, Mr. Sackrison in 2004 indicates to a management person at Zurn, Rick Whitaker, that these "Zurn

brass fittings are starting to fail at an alarming rate." He goes on saying: "Why are brass tee's and elbows the problems? Why not other fittings? Are the brass fittings up to specs? Is there manufacturing problems? Are there plans to change vendors?" And then he says: "HELP!!!!!!" with all kinds of exclamation points and all caps.

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In 2005, a different manufacturer's rep -- this is the end of 2005, December of 2005. A rep from the state of Michigan says to a number of people, including Zurn employees, including the vice president of sales and actually the president of one of the Zurn entities as one of the recipients of this e-mail, this person who's out in the field selling the product, dealing with the problem says:

"We are all sitting around watching a ticking time bomb, why do we wait for fittings to fail when we know there is an existing problem?"

By 2005, Zurn is telling plumbers in certain areas of the country, telling them orally to stop using these brass fittings. Minnesota is an area where they admit that they were telling people in 2005 stop using these fittings. They never recalled them, they never issued a post-sale warning or technical bulletin, but they told people stop using these fittings because of the failures.

The failures continue to mount and by early 2007

Zurn is acquired by another entity and as part of their

business planning they make a corporate decision in early 2007 to phase these brass fittings out completely by fiscal year 2009.

By June of 2007, just over a year ago, year and a half ago, Zurn stopped delivering these brass fittings to the state of Minnesota. You cannot get these brass fittings from Zurn distributors in the state of Minnesota. Interestingly, you can still get them at Home Depot and Lowe's, and I don't quite understand why they do that, but they do.

THE COURT: Old inventory?

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MR. RAITER: Yeah. The ones I just gave you came from Home Depot. I don't think if it's old -- I don't think it's old inventory. Actually, the testimony has been they still deliver to them. Why that is, I don't know.

But Zurn has indicated that it is moving away from these fittings in part because it now has a system that involves what they call CR fittings, corrosion resistant fittings. They're plastic, or a polymer plastic. Once Zurn had that system available, it then started pushing to transition plumbers to get away from the brass, admittedly in part because of the failures, also admittedly, your Honor, because the price of copper has been volatile. That's their testimony, is that the price of copper has made it difficult to price these fittings; therefore, you should move to plastic.

Somewhere along the line Zurn decides to stop
paying warranty claims and therein gives rise to these suits,
because people now feel that they had a warranty for these
fittings and that when they've had failures they should be
covered by that warranty.

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Zurn will take the position that, well, you had, quote, unquote, aggressive water and we don't cover aggressive water. Well, their warranty doesn't have an exclusion for that. They have an exclusion for corrosive water conditions. That's not defined within the warranty. They quite frankly don't know what that means. They can't define it.

But nonetheless, what they've done is, when a warranty claim comes in, they have uniformly handled the warranty claim process. They look at the fitting, they do some visual examination of why it failed. When they conclude that it was stress corrosion cracking or dezincification, which they're able to do from a visual examination of the failure, they automatically conclude that it must have been aggressive water. They do that without testing the water. They don't go out and actually see what caused — what the water was like. They conclude it's stress corrosion cracking caused by aggressive water, we don't cover that, you're out of luck.

At the same time, they're also actively encouraging

people not to make warranty claims to Zurn, but to submit it to your own insurance company, submit it to your plumber's insurance company, and somehow get the claims away from Zurn. Why that's important, your Honor, is that we don't exactly know how many failures are out there because of that process. What we do know with relative certainty are the number of warranty claims that Zurn has received, but we don't know how many fittings have failed in the field.

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And if you go back to my prior comments about there not being a stamp saying "Zurn" on the fitting, that also adds to the problem. They say "Q PEX," so we know they're Zurn, but if your Honor finds one of these in her wall at her house and looks at it, unless you get on the Internet and do some pretty substantial digging, it's hard to figure out who manufactured those fittings. But again, when you have one in your hand, we all know what it is.

So, there's been a tendency of some plumbers and some homeowners to not make a claim to Zurn, so I think we'll be talking throughout the case about failure rates perhaps, how many of these have failed, what is the rate of failure. I believe we're never going to be able to conclusively with any sort of certainty establish what the failure rate is because of these problems.

Zurn doesn't track, for example, where this is installed. It doesn't have a list of people who have the

product, but with reasonable efforts we can identify them and we have already throughout the course of our case and we will in the future.

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Zurn's defense in part is: Hey, these are industry standard fittings, they comply with industry standards, and it's just your water. Now, there are literally failures in the state of Hawaii all the way across the United States, down to Florida, to Massachusetts, New Hampshire, Texas, California, Minnesota, Michigan, Montana, Idaho, Missouri. You can go on and on and on. North Dakota, Indiana. There are failures everywhere. Obviously our position is, if your product is failing in water across the country, you've got a design problem. It's not a water problem.

But we go back to this industry standard issue that they raise, and what's important to know is that other manufacturers don't use this kind of brass. Many of them have withdrawn this kind of brass from the market. Many of them use different types of fitting systems so that there's not as much stress on the fittings.

And some of those that did sell product, very much like the fittings that Zurn has sold, have had lawsuits.

There are lawsuits pending against Wirsbo down in Nevada.

There's a lawsuit against Kitec, which makes a PEX system with brass fittings. In the state of Nevada they just settled — two counties, only two counties in the Las Vegas

area -- for \$90 million for dezincification of brass PEX fittings. Uponor Wirsbo, which is based -- their North American operation is based right here in Apple Valley, Minnesota -- Wirsbo was supplied some of these very same style fittings that Zurn was supplied by one of Zurn's same suppliers, so they had a mutual supplier of these fittings. Wirsbo had problems in the state of Virginia to the tune of five or more million dollars for replacement and retrofitting, and Wirsbo has sued that same supplier, that is, one of Zurn's suppliers, down in Texas, making the allegation that these fittings are defective, unmerchantable, didn't comply with warranties, et cetera, because Wirsbo thinks what they got was not a good product. Wirsbo stood behind its warranty, so when people came forward with a failure, Wirsbo took care of it and then decided to go back against the supplier. Zurn's not done that here yet.

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Zurn has had failures, though, across all four of its major suppliers of these fittings, so it isn't limited to one supplier. It's not only limited to one type of the fitting either. Some of them are different sizes. Some are half-inch, some are three-eighths, some are Ts, some are elbows. The testimony in the case is they're seeing similar numbers of failures across the different designs and they're seeing a similar number of failures across the different suppliers. So, again, in our opinion that supports our

position what we have here is a design and choice of material problem, not a water problem.

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Now, where are we in terms of the litigation.

There are currently ten putative class actions pending that we expect will all be transferred to this district. Some of them have already been transferred, some are on their way, some I believe are in the 15-day objection period to get transferred before your Honor for future handling.

As you can see, the Cox case that we filed was started first and it's listed as filed in September of 2007. It was served before then. It was actually served I believe at the end of July or early August. I forget which month exactly, but the summer of 2007 is when the case was initiated.

And these other cases, obviously, are pending:

District of North Dakota, two more in Minnesota, we're in

Colorado, we're in the Eastern and Western District of North

Carolina, Montana, Virginia, and also now the Southern

District of Alabama.

There are going to be more cases. There will be more cases filed by this group of plaintiffs attorneys who are before you. We've also been contacted by other plaintiffs attorneys who have indicated to us that they intend to file suit or that they are investigating and

deciding whether to file suit. Obviously I can't speak with certainty about what they do, but I do know from our group's perspective we have other suits that we intend to file. Thev will likely be filed in other districts covering other They will be putative class actions. interesting issue, because you don't have a lot of state court litigation on these fittings right now, you have some, and Mr. O'Neal can talk about that. There are often subrogation claims. The value of these claims sometimes are only in the several hundred dollar range for a failure, sometimes they're up north of a hundred thousand dollars. I'm aware of at least one home that sustained damage more than a hundred thousand dollars, but often they're in the few thousand dollar range. They're several thousand apiece. you won't see diversity jurisdiction in most of the individual cases, so the cases that are going to end up before your Honor I'm almost certain will be putative class actions removed under CAFA.

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THE COURT: How many more are out there do you know about at this point?

MR. RAITER: Well, I have contacts. I personally, my firm has contacts with people in a number of different states that if I wanted to file these cases in a bunch of different states, I could file ten more very easily within a couple of weeks if I wanted to. There are questions -- we

need to do our due diligence to make sure they really have the right product, that they've had a failure, that there isn't some other potential cause of the failure. But I'm guessing ten to 20 other cases you could expect and maybe more and maybe less. Part of this is hard to spitball right now.

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THE COURT: How many plaintiffs are in the ones that are already filed, individual claims?

MR. RAITER: Well, in the Cox case we have three sets of married couples. In the Minnerath case there's one married couple. The majority of them are single married couple or single individual cases, so you have a single property owner.

In the Colorado case it's actually a plumbing company as the plaintiff. The plumbing company paid for damage that it believes was caused by Zurn's product issues, and that's pretty common. We're going to hear about that in the course of the case, that what you see often is the mom-and-pop plumber who gets called out to Judge Montgomery's house and he plumbed it the year before. And she says, "Gee, I just had something fail behind my wall." And the mom-and-pop plumber in a small town, because it's his or her reputation and their work, they stand behind it and they come in and they typically will cut out the drywall, they'll find the fitting that's failed. Zurn now recommends replacing any

of those fittings with plastic, with its plastic fitting, so they cut out the brass and put in a plastic fitting. It's a relatively easy process once you find the fittings behind the walls. And then those same plumbers usually will pay to have the drywall repaired and then often don't do anything about it. They just eat the expense.

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Some of them -- there's a plumber in northwestern Minnesota, in Alexandria, who's had several hundred failures, different properties, approaching if not at 200 failures. He too was paying for them himself and taking care of it. He then was submitting them to Zurn, which honored its warranty for a number of years. They then stopped honoring its warranty and now he has to submit them to his own insurance carrier, which is problematic for all the reasons we know you can have problems for submitting claims: claims histories, deductibles, things like that.

So right now you've got a fairly small group of class action plaintiffs, probably 20 individuals and entities before you. It's hard to say how many more would come in and what those cases would look like in terms of how the caption is styled if they come in from firms that are not before you right now.

So if we look at the status of the litigation, the cases that are going to be before you today or will be in the near future, Cox obviously is the most progressed. We've had

initial document discovery in Cox. We've taken a handful of depositions, a few 30(b)(6)s. The defense has taken the depositions of four of the six class representatives, none of the plumbers, none of the distributors yet. We've had third-party subpoenas out. We still have work to do on electronically stored discovery. Magistrate Judge Erickson in one of his orders told us to focus on hard-copy documents first and then go make focused requests for electronic discovery. We're now at the stage to make those focused requests and we've started that process.

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We have requests for depositions outstanding in Cox that have been hung up in part because of this MDL transfer process.

The Barnes case up in North Dakota, we've taken one deposition. There was a motion to enjoin filed there by Zurn to enjoin us from filing additional suits. That was denied.

In all the other cases, your Honor, I believe there have been no other depositions. There's been no motion practice. In some of those cases there's been no Rule 26 conference and no documents produced in many of those cases. There have been some documents produced in a few of them and what Zurn has done is turned over the same documents that they've produced to me in the Cox case electronically, so they've been given the full load of the documents that we have right now, which total something north of 30,000 pages.

What I think the challenge before your Honor is is how to proceed, obviously, with managing these cases.

Right now you've got ten cases. They're all individual and separate cases. They're before you for coordination.

They're not consolidated. They are ten separate cases.

You're obviously charged with handling the pretrial proceedings here.

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Class certification is always a big issue in these types of cases, but so are other motion practice: judgment, perhaps Daubert motions, and quite frankly trial, because under the **Lexicon** case, you've got three cases before you that will be tried in this district at some point in time, and those cases will be tried before you regardless of how class certification is decided. So while class certification is an initial focus, we certainly need to also talk about big-picture case management, getting to trial, getting the work done that we need to get done, giving these folks who are coming in from other districts the opportunity to get the work done that they need to get done. Because if and when you transfer or remand cases back to their districts, they now have to live with the work and work product that we have before you or that we've done before you, and when they go back to trial, hopefully they'll be well prepared to try those cases if they do go back to trial. Obviously we hope they don't by way of settlement, but that's always a concern in this type of litigation. We need to keep our eye on the ultimate goal, which is trying the case to verdict.

So that, your Honor, is my summary. If you have questions, I'd be happy to answer them right now.

THE COURT: No. I think you've used up quite a bit of the time, so I'll proceed directly to Mr. O'Neal's recitation of the defense summary.

MR. O'NEAL: Thank you, your Honor. If I may, I'm going to get my toys here.

THE COURT: All right.

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MR. O'NEAL: As far as my client is concerned, there's really one overwhelming fact about this litigation in their minds, and that is that we have sold since the mid- to late 1990s over 200 million of these fittings. They are a very well-established product that are all over the place. We have competitors who sell and continue to sell the same fitting with the same yellow brass, the same crimping mechanism, all of which is set forth in the F1807 standard. Those companies, as I understand it, include companies called Rehau, Viega, Nibco, and I believe there are one or two others.

Most of those companies also have the plastic fitting which I have here. We started selling these plastic fittings a few years ago as indicated. They have the

advantage, as Mr. Raiter indicated, that there's no copper in them and they are cheaper for us to acquire and cheaper for the customer to buy. They're lower priced than the yellow brass fittings. They also are corrosion resistant.

Obviously they're made of plastic, so to the extent there have been corrosion issues, they don't apply with the plastic fitting, but we continue at this point in time to sell the yellow brass fittings. Now, the -- and we are targeting to get out of that market for both of those reasons that we said, we're continuing to do it and there's continuing to be a significant demand for them.

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The number of failures and the extent to which this problem exists in the context of 200 million fittings is going to be a subject of substantial dispute in this case based on what Mr. Raiter has said. They are not failing like popcorn all over the country, although there have been failures in a number of different places. We are trying to count what there is, what is available to us, and at this point in time we are still south of 2,000 failures, however one may define that. There are issues about whether that means number of fittings or number of claimants or whatever, but in any event, the number when compared to the number 200 million is very small. And the extent to which this problem exists is not as has been suggested in the remarks of Mr. Raiter.

Now, there are things that occur where the fittings crack or the fittings leak due to this phenomenon, stress corrosion cracking, or due to other phenomena, which will require an individualized analysis of the fittings to see what is the cause of the failure in any particular fitting.

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Now, the failure rate issue, granted, we cannot say we know of every failure and there may be failures that are not reported to Zurn, but I think the reliability of the fact that we know the majority of them is better than suggested by Mr. Raiter. The plumber knows what fittings he puts into a house, the people will know who their plumber is, and if they have a failure, they contact their plumber. So, the fact is that all we can know is what we know, we can't know what we don't know, and what we know is that our failure rate is very, very small with these fittings.

Another interesting fact is that the failures are localized and let me explain what I mean by that. I don't mean they're only in one state. They've been in lots just like Mr. Raiter said, but they have tended to occur in bunches and the biggest bunch is in our home state of Minnesota. In fact, the biggest bunch within Minnesota is up around the Alexandria and Detroit Lakes area.

And when you look at these e-mails that Mr. Raiter put in through his slide presentation, those relate to and are from individuals involved in a situation in Michigan with

a development called the Oakmonte development and there were a number of failures there. And the other from Mr. Sackrison relates to a lot of failures, relatively speaking, in the Alexandria/Becker County area. So that when they're saying we've had lots of failures, it's large, whatever, they are doing it in the context of a particular problem in a particular localized locality.

THE COURT: Cluster effect.

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MR. O'NEAL: Yeah. In fact, there are four homes on a place called Omaha Lane up in northern Minnesota which have had failures right next to each other and that is to me a remarkable fact with the low failure rate that we have in comparison with the number of fittings that are out there.

So, this raises a situation of having to explain why are there some but in context not that many failures if it's a design issue as Mr. Raiter indicates, and that is exactly the type of individualized analysis that has led to the denial of class certification in most of the product liability class actions that have come before the federal courts for the last numerous years.

When we are trying to analyze these issues, fittings that have leaks, we do look at the water and it is -- we do not, as Mr. Raiter said, have one single answer where we can say, well, if you have ammonia in the water you will have a problem and if you don't you won't. It's not

that simple. And there are a variety of substances which the literature suggests will aggravate the corrosive potential of water, make it more aggressive and potentially have a stronger effect on brass.

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We are learning that Minnesota in particular has some water quality issues. Minnesota has more municipalities that violate what is called the lead copper rule than any state in the country. That means they got more copper in the water than the EPA standards allow and they can't seem to fix it. So something is happening with respect to corrosion and we're still looking into exactly what's going on with water treatment or whatever, but aggressive water is a legitimate issue here.

Furthermore, we are finding installation issues with respect to the failures just in the depositions that have been taken, as Mr. Raiter said. We are finding that plumbers do not always follow the detailed installation instruction that Zurn's put forth. There are issues regarding the location of the crimp ring, the support for the pipes, which we believe the science will show that it can have that effect on the stresses of the fittings and failures of the fittings. It is not a uniform problem. It is an issue in which the plumbers may have some responsibility. It's conceivable that something with the water treatment is going wrong. It is conceivable that you find a burr from

manufacturing. While they might say that's Zurn's responsibility, we might say we should be entitled to reach out to our vendors who manufacture this product for us and they should be contributing or paying the entire settlement for a particular case.

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So as we look at this situation, we have a low failure rate, although the number of failures can be painted as large because we sell 200 million-plus of these fittings, and we have a situation where the company has moved — has come up with an improved product and is moving toward it and yet these fittings have been an established product in American plumbing for a long time now.

So, the situation is, I think, different and more complicated than you heard, and ultimately when we're arguing class certification, we are going to be talking about the need in individual cases to analyze, yes, water issues, also installation issues, manufacture issues, whether it is really stress corrosion cracking, or dezincification, or erosion corrosion, or mechanical failure, or a simple leak because the plumber didn't crimp it enough.

And the abundance of those individual issues, not to mention the individual issues that are always involved when you're talking about a warranty case: did they get the warranty, did they read the warranty; or a consumer fraud case: who said what to whom, what representations were made,

were they relied on, was it reasonable to rely on them, all classic reasons why class certification tends to be denied in cases just like this.

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So we are anxious, your Honor, to get to the resolution of class certification as soon as we practically can, because we believe class certification will be denied. If we're wrong in that belief, we want to know it because that has implications, obviously, for Zurn and its insurers. If we're right in that belief, I think the plaintiffs attorneys should want to know it so they don't expend huge amounts of resources and money in litigating a case that is never going to get certified.

Now, with respect to the Cox case, I think that we have done quite a lot. The case was commenced, as Mr. Raiter said, I think in July of '07. We negotiated and have in place a protective order governing confidentiality of documents. Discovery was phased by Judge Erickson so that we're focusing on class certification discovery. We have produced documents. We've had a number of discovery issues involving privilege issues and redaction issues presented and ruled upon by Judge Erickson. Plaintiffs have taken four 30(b)(6) witnesses who actually were quite important substantively in the case and also deposed the main claims person for Zurn over a number of years. We've deposed the Coxes and another class representative who was also a plumber

who installed his own fittings. We've inspected those homes. As Mr. Raiter indicated, each side has put several hundred fittings into an independent lab here in the Cities for nondestructive evaluation, and we were in agreement as to a basic protocol concerning destructive testing which has kind of been put on hold by the MDL. So we've been moving forward with a schedule that was set by Judge Erickson and that would have put class certification ripe to be resolved by you in January of 2009.

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Now, then we got the MDL order. Mr. Raiter and Mr. Rudd I believe petitioned for the creation of an MDL. We opposed it saying that we were afraid it would delay class certification and we were interested in getting that resolved and we were on pace to get that done before Judge Montgomery. We did say that if there was to be an MDL, we supported the view that it should be assigned to you, which don't hold it against us, please, and the panel elected to create the MDL, although at least one judge on the panel was questioning Mr. Connolly, and when he said he didn't want to lose the Cox schedule, the judge said, well, why couldn't Judge Montgomery keep to that schedule.

We've agreed that that schedule isn't going to work exactly the way that it was given what we've got now, but we also do not believe that there's a need to radically revise the work plan, radically revise the idea that we're moving

forward toward class certification. We would like to know what we're really dealing with here. We don't think you have to run down every scientific issue or every liability issue or every document in order for your Honor to understand the claims enough to consider class certification. I think you've got a good understanding just on these presentations. Ultimately, of course, it is our view that like so many other product liability class actions in the Eighth Circuit and otherwise, class certification of any sort is inappropriate here because of the predominance of individual issues.

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We've got some case management issues that I believe we're going to -- oh, I was going to show you the crimping just to get an illustration.

There are a few different configurations of fittings, but most of them tend to be a T like this (indicating) one or an elbow like this one (indicating). And you insert the brass fitting into the PEX pipe, the plastic pipe, with a copper crimp ring around the outside diameter of the PEX, and then you use a special tool called a crimper to crimp the crimp ring in place so that it makes a seal.

THE COURT: Tightens it up.

MR. O'NEAL: Yeah. And then the plumber is given what they call a Go/No gauge with a large opening and a smaller opening and he is supposed to test the crimp, because if you make the crimp too small, you may put too much stress

in the pipe. If you don't make the crimp small enough, it's a loose connection and you can get leaks that way. So this Go/No gauge is used to make sure the size of the diameter of the ring is appropriate, within spec, once you've made the crimp.

THE COURT: So you're able to slide that thing over the crimp? Is that how it works?

MR. O'NEAL: It says "Go" on this opening and "No Go" on this opening and you put it like that or like that.

THE COURT: All right.

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MR. O'NEAL: So it's got to pass both tests. This is why I like trial law. You get to play with these things.

I should say that that crimping technique just like I showed you is not something Zurn by itself invented or is limited to Zurn. It is set forth in the ASTM standard F1807. That was created back in the '90s when PEX was becoming the new flexible plastic piping to be used in the plumbing industry.

So we had one of our technical people, our head technical people, involved in that process. So did a lot of other companies, so did the usual collection of experts and industry people and so forth who were always involved in ASTM standards. That standard specifically says you can use the alloy that we use. It specifically says this is the crimping mechanism and this is how you do it and these are the

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     dimensions and this is the geometry of the part. So when
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     they attack the crimping and the alloy and the zinc and the
     diameter of the part, they are attacking something that is
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     actually set forth and required by an industry standard not
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     developed by Zurn.
                So, those are some of the facts that I wanted to
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     cover in my summary. Unless you have questions, perhaps we
     can move to PTO Number 1 I think is the next item.
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                THE COURT:
                           All right. Mr. Raiter, do you want to
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     be heard on that issue?
                              Your Honor, obviously we'll talk more
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                MR. RAITER:
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     about class certification at the appropriate time.
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                THE COURT:
                             I feel like I'm hearing that motion
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     today.
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               MR. RAITER:
                              Yeah, there's a lot more --
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               THE COURT:
                             I'm oriented.
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                              There's a lot more to hear --
               MR. RAITER:
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               MR. O'NEAL:
                              If you rule on it, some of the
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     lawyers --
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                THE COURT:
                             Yeah, I think I'm just ready to rule
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     from the bench. Probably not.
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           (Laughter)
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               MR. RAITER:
                              We have a strong disagreement about
     the standard.
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                THE COURT: I'm sure.
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MR. RAITER: And polybutylene was also subject to a standard that no longer applies, and the same people who brought us polybutylene brought us Zurn PEX.

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That being said, your Honor, PTO 1 is an agreed organizational structure. It's an agreement of all the plaintiffs lawyers who have filed a case to date. We've proposed the leadership structure you're familiar with, I'm sure, if you've read the proposed order setting out the normal leadership and organizational structure and the general duties of that structure.

all of these lawyers on this side of the table know each other both from this case now, but then also from prior litigation. We've submitted to your Honor the various firm resumes, lawyer resumes, experience. All of us, I believe, have been appointed lead counsel in class actions in the past, have been involved in MDLs in one fashion or another and would ask you to enter that order, there being no objection to it at this point.

THE COURT: All right. Mr. O'Neal, do you wish to be heard on that?

MR. O'NEAL: We have no objection to PTO 1, your Honor.

THE COURT: I am not going to sign PTO 1 at this juncture. I understand it's been proposed and I don't have a serious objection to it, but I am signed up go to MDL school

in October and I want to get oriented on it before I sign any orders that I feel I'm locking myself into. So I don't want to cause undue concern, but I am not prepared to sign that at this time. We'll, however, proceed ahead with regard to PTO 2.

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MR. RAITER: That's fine, your Honor. You certainly issue an order when you're ready to issue an order.

The issue we have then becomes really how does Mr. O'Neal interface with us, and obviously our group thus far has agreed on a structure and kind of a leadership role for us and the liaison counsel role, and I believe we'd continue to probably follow that structure, but it does present some issues for Mr. O'Neal to get commitment from us in the meantime, and that's the concern about waiting too long to do so.

THE COURT: Mr. O'Neal, do you have problems with waiting one month before the order is signed? Under the current structure, it seems like you've been working well together to this point.

MR. O'NEAL: Yes, your Honor. I certainly understand your desire to wait and I think we can work it out. I have indicated to Shawn -- and I don't think it's any surprise to him -- that it's very important in our discussions that if he tells me something and doesn't say there's controversy or there's disagreement, I'm going to

assume he's speaking for everybody, but he's been telling me when there's disagreement and I think we can continue until you're ready on that basis.

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THE COURT: Okay. Well, I'm going to ask that you do so, and I do think that the proviso be that you deal with Mr. Raiter when there's a dispute, or if he does not speak with a single voice for all of the plaintiffs counsel, it should be noted otherwise and I'll review that in light of how I'm educated, I guess, in October.

MR. RAITER: Okay, your Honor. PTO Number 2 is a pretrial order that Mr. O'Neal and I have been discussing.

You've not seen it yet because it's not finalized and we just really started the exchange of comments about it this week in earnest. He had forwarded it to me last week.

One of the caveats that I was giving to Mr. O'Neal was I can't bind this group yet until the judge gives me the authority to bind the group, so that is part of this issue. We will continue to negotiate the terms that we do have disagreement about right now.

We also need input from my group -- several of our members are not here. They start trial on Monday, two of them do, and another one is in a mediation that he could not get out of to be here. But the main issues that we really need to focus on in PTO 2 are the schedule and then class certification and what are we going to certify and when, and

we have a dispute right now about whether we go off of a master complaint that would be applicable to all the cases on file at the time the motion is filed, or whether we go from the individual complaints that have already been filed.

There are pros and cons to both and right now Mr. O'Neal and I do not have an agreement on that approach.

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How we approach that and whether we do certification in a staged fashion, for example — the judge handling the FedEx litigation just recently approached certification in a staged fashion, so he heard several motions first and considered them, issued rulings, and then the parties decided how to approach the remainder from there. That's generally our thought right now, although we still as a group have not concluded exactly how we wish to approach this.

The other approach, of course, is we come to you in one shot and make every class certification motion that we could possibly make in one setting. We tend to believe that that probably is not the most efficient approach to this, because if we're trying to stay to a relatively aggressive schedule for certification, it will be difficult to get all the work done that we need to get done to have all of these cases ready for certification.

The Alabama case, for example, has not even been served yet. It was recently filed, but it's not even been

served. So that's really the main issue that we're working on.

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We then have some disputes about simply discovery, scope of discovery, how many depositions, things like that that I believe reasonable counsel typically can at least get an agreement on or fairly close to an agreement on, and if not, we'd either come back before your Honor or Magistrate Judge Erickson depending on how you wish to proceed on that issue.

The order otherwise, your Honor, talks about how are we going to handle filings, how are we going to handle service, how are we going to handle deposition protocol, deposition notices, lots of administrative things that are very typical in these types of pretrial orders, and we hope to be able to get something to you in the near future after we've exhausted our meet-and-confer, either have agreed on a pretrial order or need direction from your Honor.

THE COURT: Do you anticipate that there'll be any plaintiffs who are operating pro se in this matter?

MR. RAITER: I doubt it. Again, getting them into federal court with jurisdiction would be difficult. Seeing a pro se plaintiff with more than \$75,000 in damage I think would be unusual unless they make some allegations that go over and above property damage.

So, we anticipate that what you're going to see is

experienced class action counsel before you with proposed or putative class action cases either on a statewide basis, multi-state basis or national basis. So I don't anticipate like in a pharmaceutical case or a device case where you will have some pro se plaintiffs and you will have some state court interaction where you need to manage the relationship -- Judge Davis did a great job in <a href="Baycol">Baycol</a> managing the state court litigation, pro se litigation and the federal litigation. I think most of us in this room believe that what you're going to have is primarily federal litigation with attorneys who hopefully know what they're doing on this type of litigation.

THE COURT: All right.

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MR. O'NEAL: I just thought I'd make sure that it's clear what the discussions are about this master complaint and class certification, how it's going to be teed up, because this is an area that you might want to network about at your MDL school, because it's going to be an issue, and as Mr. Raiter said, there are pros and cons to different ways of doing things.

We are not hung up on the master complaint. We suggested it because our underlying goals are to get to certification as quickly as we reasonably can and once we've got it resolved we may have an issue here or an issue there, but the basic heart of class certification should be done, in

1 our view.

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The Cox case, the complaint in the Cox case pled a request for a national class, alternatively a state of Minnesota class, alternatively regional classes with a variety of states within it. So that was an all-encompassing complaint, class action complaint, that was on a schedule for resolution of class action issues in January.

While there are other lawyers, fine lawyers involved, other states involved, I don't see why that fact changes the ability to resolve the fundamental Rule 23 issues of predominance and superiority and commonality and typicality. So our goal is to get those issues resolved and, yes, there are going to be — there's going to be the potential for other issues, but basically to get it resolved once and for all, whether that's through the vehicle of the master complaint or some other vehicle.

So that's -- may I ask when in October is the -
THE COURT: It is kind of toward the end. I think
it's the 27th, 28th, something like that.

MR. O'NEAL: Well, in any event, that's going to be a significant issue that Shawn and I are discussing right now.

MR. RAITER: If I may comment, your Honor.

Plaintiffs, as Mr. O'Neal kind of speculated before, don't have any desire to litigate this case for

another three years only to find out that we're not going to proceed on a class basis. On the other hand, we have an obligation as MDL counsel to prepare the case properly not only for certification but for trial. And even if your Honor denies certification, we're going to be right back in front of you talking about how do we resolve these cases, what is there left to do, how do we get them ready. Maybe they resolve themselves without your involvement. We don't know.

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So we have to keep the big picture in mind, that it isn't just certification and it isn't just now the Cox case and you all, because you came into this MDL behind the Cox case, have to live with what I've done and what I intend to do in the future. We now have an obligation to the cases that are here and the cases that will show up later on. have to prepare them properly. We have to give them their due course. It's not to say that we're going to sit here and wait and wait for every case to come in before we proceed, but we have a little bit of a differing view, I think, on the aggressiveness of the schedule to get all of the cases resolved. And again, a lot of the work has been done in Cox and a lot of the work will apply to all the other cases, but there are some issues that will be independent or individual for each particular case in terms of the plaintiffs in that case need to be deposed. They need to inspect their home. We will need to do that work at some point.

So, we're very willing to proceed, we're ready to work, we have been working, those of us who have been on the cases for awhile, Mr. Rudd and I in particular, and even the other folks who started behind us have been very diligent about trying to move their cases before they were transferred to this district.

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So, we very well would like to get certification decided sooner rather than later, but we need to be cognizant of the fact that we need to do it right and we need to have the record that you need, because there are those cases where your Honor might say, "I don't think I have a sufficient record before me to make this ruling and I want you to go back and do certain work," and we don't want to find ourselves in that position.

THE COURT: Well, let me make a couple of comments and hopefully of a helpful nature.

I did regard today's session primarily as getting me up to speed educationally on what these cases are all about and I thank you for that, and I think it has been helpful and I do think -- I don't have a lot of natural inclination for plumbing, but I do understand much more what the issues are and how they're joined and I think it's a good heads-up for me.

As I said, I intend over the next month or so to increase my educational level. I've had obviously some

familiarity, handled some MDL proceedings in my magistrate judge capacity, so I do want to get up to speed and do think -- hopefully this seminar I'm attending will be helpful and I also have a huge number of HRT cases assigned to me now that I'm sorting out and that may increase my familiarity with Judge Wilson's task down in Arkansas and how my cases fit into it, so that's helping me with regard to the learning curve.

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It is my intention and I do want to make clear to you that I will hear myself all of the pretrial issues. I do not intend to use Magistrate Judge Erickson. I thank him for his involvement in Cox up to this point, but I do see my function as the judge appointed by the MDL panel to manage the pretrial. And so obviously there could be changes depending on schedule and other concerns, things that could happen, but from now on I would like all of those pretrial matters scheduled in front of me and it will be a case that I'll manage. Using my former background as a magistrate, I think I'm pretty familiar with pretrial issues, so that will be one of my intentions, to have all matters brought to me on the pretrial motions.

I do want to encourage counsel to -- and I think -- Gertie, do you have that form order you can provide them with or we can change it?

The Clerk's Office has been working on a special

form that seems to work well for MDLs that we'll get to you with regard to how to file and getting things so that the filing in the CM/ECF system works well. And whether we go to some master complaint, I don't think that's necessary with regard to how things are filed, but we'll at least have one number that you'll file in and we'll set up how the notice is provided, and I think those of you that have been in this area a lot are probably more familiar with it than I, but it will work out. It's also my intent to have an MDL web site set up for this as we've done with other MDLs that will make access to some of that information from the Court's end helpful. So those are intentions at this point and thoughts about how I see things as they develop.

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I do encourage counsel to continue to cooperate as they have been in the preparation of PTO Number 1 to see what can be done with regard to schedule and some agreements with regard to the issue of discovery coordination.

Sometimes I'm surprised when I hear that my reputation is other than I expect it to be, but I think most of the counsel here know. I think I process cases pretty quickly. I'm not somebody that drags my feet a whole long time, tend to be very current on my cases. So I do think that the issue of class certification is something that should be addressed earlier rather than later. I can't give you a time frame today as to when I think that makes sense.

I'm guessing that you have a better idea than I when that makes sense, but obviously the January '09 date in Cox is not going to be practicable for a number of reasons. But it is my intent to meet that issue head on and the sooner you feel that you're ready to go, we will accommodate you with scheduling that seems to make sense to us on that.

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So I don't want anyone to interpret my early delay in signing the first order here such that we're going to postpone a lot of things. I think we need to keep these cases moving along just like I do any of my other caseload issues.

Let's see. The last item on your agenda is future scheduling of status conferences. I guess my practical nature makes me want to know how many I'm going to have in my flock before I go too far on and I'd like to try to figure out what the nature of the numbers are going to be fairly soon.

MR. RAITER: Your Honor, my guess is by the time you're back from your conference we'll have a better feel for at least the cases that are likely to be filed in the near term.

We both been involved in MDLs with many, many cases and MDL judges in those cases will hold perhaps monthly status conferences. From our perspective on this side of the room, monthly status conferences may be helpful to your

Honor, but I'm not sure they're going to be needed here. It may be something less than that, it may be on an as-needed basis when we agree that we need to be before you or that you would like some input from us about where we're at and what we're doing. But we put that on there because it's an open question and there is no real answer and we wanted to get some guidance from you about how you would like to proceed with handling the case.

THE COURT: Mr. O'Neal?

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MR. O'NEAL: We talked about it and we also felt that monthly would probably more than is needed for this case. We were thinking every two months, but whatever your Honor thinks is best.

THE COURT: Well, here's what makes sense to me today. I think we probably need a status conference at least to keep my feet to the fire with regard to signing the first order and to apprise you of any changes I see to how things should be as I return from my seminar, so I think we should probably have another status conference in early November, early to mid-November, to kind of make sure that we're on track and we know where we are, and at that time and given the benefits of further education, maybe I'll have a better sense. My hope is that you might have an agreed upon PTO Number 2 by that time.

MR. O'NEAL: May I ask something, your Honor?

THE COURT: Sure.

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MR. O'NEAL: One of the issues that the MDL school raises, I guess — and we talked about this a little already — is the extent to which work can continue between now and then. They had requested several depositions of our people, we have requested depositions of some of the plaintiffs and plumbers, and I think it would be good to keep this moving. On the other hand, we don't want those depositions to be said to be only in the Cox case and then everybody gets multiple depositions of the same people, so I'm just raising that as an issue. November is still a ways away.

THE COURT: Well, I'd like the discovery to proceed. It seems to me that the depositions that are scheduled -- I certainly don't mean to stay anything while I proceed before I sign this. So to the extent you can find -- and it seems to me that there's plenty of things to do in the next month while I figure this out and get ready to sign the order that can proceed given the very likelihood that the order will be signed as is.

MR. O'NEAL: Just so it's clear, though, if -- for example, one of the people is our company president that they've asked for. We would contemplate if he is deposed, that's it for at least during the class certification phase, and so Shawn and I will talk and we'll see where it goes.

THE COURT: Okay. And if you get to a point where

you can't resolve that before the next conference, then I'll hear that and decide it. I can decide those sort of issues without the education of the conference.

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MR. RAITER: Your Honor, I'm sure we'll be able to reach an agreement on how to go forward on those. The one issue that we do have an ongoing dispute about was, in the pretrial orders that Magistrate Judge Erickson issued in both my case, the Cox case, and then Mr. Rudd's case, the Minnerath case, he had a ten-deposition limit in each of those cases.

THE COURT: I think those pretrial orders are suspended now for the time being till I can reassess and have a new order.

MR. RAITER: My concern is, I don't want to burn up a bunch of depositions and then people later say we only had ten depositions and we took the wrong ones. These are all key people. I don't think anyone disputes that who we've asked for are the very key people that we need to talk to before certification, so we'll proceed on that basis then.

THE COURT: Okay. That seems to make sense.

It does seem to me given the out-of-town counsel it makes sense to schedule these fairly far in advance and not on too short a notice.

So, Gertie, do you have the big red book with you?

THE CLERK: I'll get it.

1 MR. O'NEAL: While we're waiting for that, your 2 Honor, I should tell you I'm involved in those HT cases. You 3 say you've gotten them or --4 This is the hormone replacement THE COURT: 5 therapy cases, Prempro and others, that are assigned to Judge Wilson in Arkansas. About 5,000 or so were filed in 6 7 Minnesota. I have the lowest number of the Minnesota cases, so those that will not be part of the Arkansas case will all 8 9 be consolidated in front of me. And that has not been done 10 administratively so far just because it didn't make sense to 11 us to have the Clerk's Office reassign all those to know they 12 were going to be shipped out, so we kind of tried to wait --13 MR. O'NEAL: I'm lead counsel for one of the 14 defendants in that, so --1.5 THE COURT: Okay. That's what seems to be 16 happening there. 17 Gertie, mid-October, post-election -- or 18 mid-November. Excuse me. 19 The week of November 17th, either the THE CLERK: 20 17th, Monday, November 17th, or Wednesday the 19th, or 2.1 Thursday the 20th. All three of those days are available. 22 MR. O'NEAL: I think they're all fine with us. 23 MR. RAITER: If it would be okay, your Honor, I 24 would caucus with my people and get back to Ms. Simon. 25 THE COURT: Okay.

I mean, perhaps even before we leave. 1 MR. RAITER: 2 Okay. Well, let's put a putative date THE COURT: out there and if it doesn't work, then you can let us know so 3 4 that we kind of got it down. 5 Let me just look at the book and what else I've got 6 on that week. 7 (Calendar handed to the Court) 8 THE COURT: For purposes of this scheduling and 9 other scheduling, I don't like to put you on on Mondays, 10 because that's typically when I start trials on other cases 11 and you're much more likely to get bumped than later in the 12 week. Later in the week I can move the trial around or 13 accommodate you a little. So let's go with Thursday the 20th of November. 14 15 Thanksgiving is the following week. Anybody know of a 16 problem? 17 Not here, your Honor. MR. RAITER: 18 MR. O'NEAL: That's fine. 19 THE CLERK: At nine a.m. 20 THE COURT: Morning or afternoon work better for 2.1 the out-of-towners? 22 MR. RAITER: Morning. 23 MR. O'NEAL: Your Honor, Mr. Shelquist is 24 indicating that his firm has their retreat that day. 25 MR. SHELQUIST: Thursday and Friday.

1 THE COURT: Thursday the 20th and 21st? 2 Your Honor, is the 19th --MR. SHELQUIST: 3 THE COURT: 19th is a possibility. Let's aim at 4 10:30 November 19th, a Wednesday. 5 MR. SHELQUIST: Your Honor, there's a standing 6 status conference before Judge Kyle in the morning that I 7 have to attend, if we could push it to 1 o'clock in the afternoon. It's at 10. 8 9 THE COURT: Okay, 1:30 the afternoon of the 19th. 10 MR. SHELQUIST: Thank you, your Honor. 11 THE COURT: All right. 12 One other matter, your Honor, that MR. RAITER: 13 Mr. Austin raised with me. In some of these cases there has been no protective order issued or no stipulated 14 15 confidentiality order, and obviously if we're not going to be 16 together for six weeks and we're going to be doing discovery 17 in the interim, we'd like these folks to be able to see the 18 documents that Zurn has produced that have been deemed 19 confidential. We both have agreed that the order that 20 Magistrate Judge Erickson issued in the case following our 2.1 stipulation could apply to this MDL. If that were the case, 22 we could have everybody sign it and we'd obviously be able to 2.3 share documents with them. 24 THE COURT: Is that an issue, Mr. O'Neal? 25 No, I think that would be fine with MR. O'NEAL:

1	us. If we can get the signed order, it can be done.
2	MR. RAITER: So I'll provide to your chambers a
3	stipulated order that is in the same form. It may vary a
4	bit, obviously, because of the language going from an
5	individual case to an MDL, but we'll keep the heart of the
6	matter
7	THE COURT: Run it by Mr. O'Neal first and send it
8	over and we'll take care of that.
9	MR. RAITER: Right. Thank you, your Honor.
10	THE COURT: Anything further?
11	(No response)
12	THE COURT: All right. We'll see you soon. I'm
13	going to spend the weekend cutting into my walls to see if I
14	have any of these.
15	(Laughter)
16	THE COURT: Then I can recuse myself, right?
17	Thank you. We'll see you soon.
18	ALL COUNSEL: Thank you, your Honor.
19	(Proceedings concluded at 11:18 a.m.)
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## CERTIFICATE

I, TIMOTHY J. WILLETTE, Official Court Reporter for the United States District Court, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes, taken in the aforementioned matter, to the best of my skill and ability.

## /s/ Timothy J. Willette

TIMOTHY J. WILLETTE, RDR, CRR

Official Court Reporter - U.S. District Court
1005 United States Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415-2247
612.664.5108